

**Editor's Note: Reconsideration denied by Order dated
October 16, 2002**

W. WESLEY WALLACE

IBLA 2002-138

Decided February 27, 2002

Petition for stay of a decision of the San Juan Field Office, Bureau of Land Management, assessing civil penalties for willful trespass and temporary suspending grazing use of certain Federal lands. T-CO-170-01-01.

Petition dismissed.

1. Grazing Permit and Licenses: Appeals--Rules of Practice: Appeals: Stay

Under the provisions of 43 CFR 4160.3(c), a petition for stay of a grazing decision must be filed within 30 days of receipt of a final decision or within 30 days of the date that a proposed decision becomes final. Where a petition for stay is not filed within the requisite time period, the Board of Land Appeals lacks jurisdiction to consider the request for a stay.

APPEARANCES: Richard M. AuBuchon, Esq. and Franklin J. Falen, Esq., Cheyenne, Wyoming, for petitioner; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On November 26, 2001, W. Wesley Wallace filed an appeal from a decision of the San Juan Field Office, Bureau of Land Management (BLM), assessing trespass damages in the amount of \$10,797 and temporarily suspending spring grazing from March 1, 2002, through May 31, 2002, in the Flodine Park, Hamilton Mesa, Cahone Mesa, and Yellow Jacket Allotments. The decision in question had been issued as a proposed decision on October 17, 2001. It was expressly provided in this decision that, if no protest were filed within 15 days, the decision

would become final without further notice. See also 43 CFR 4160.2. No protest was filed and, therefore, the decision became final on November 3, 2001. 1/

Under 43 CFR 4160.4, Wallace had 30 days from November 3, 2001, in which to file a notice of appeal. This was done by an instrument dated November 26, 2001, and received by BLM on November 30, 2001. The regulations further provide that a petition for stay may be filed within the same 30-day period provided for the filing of the notice of appeal. See 43 CFR 4160.3(c); 4.21. A petition for stay did not accompany the notice of appeal in the instant case; it did, however, accompany the statement of reasons filed in support of the appeal, which was dated December 21, 2001.

Insofar as grazing appeals are concerned, the applicable regulations, 43 CFR 4.470 and 4160.4, provide for appeals by adversely affected parties to be taken to an Administrative Law Judge. However, while jurisdiction to initially hear such appeals is lodged with an Administrative Law Judge, the regulations further provide that decisions upon requests for stays are to be determined by this Board. It is pursuant to these provisions that the matter is presently before the Board.

A review of the relevant provisions of the regulations, set forth above, makes it clear that the instant petition for stay was not timely filed. Since the decision became final on November 3, 2001, a petition for stay was required to be filed no later than December 3, 2001. While it is true that a notice of appeal was filed within this period, nothing in that notice can fairly be said to constitute a request for a stay pending resolution of the appeal. The petition for stay which accompanied the statement of reasons for appeal was clearly untimely since those documents were not even transmitted until December 21, 2001, eighteen days beyond the date on which a petition for stay was required to be filed.

1/ While appellant suggests that the decision became final on Nov. 1, 2001, this is incorrect. First of all, the 15-day period commenced running on the date that the proposed decision was received, not the date it was issued. See 43 CFR 4160.2. In this case, the proposed decision was received by appellant on Oct. 18, 2001. In computing time, the first day of a specified period is not counted, but the last day is counted. See 43 CFR 4.22(e). November 2, which was the fifteenth day following Oct. 18, was a Friday and was the last day on which the proposed decision could have been protested (see 43 CFR 1822.14). The decision became a final decision, subject to appeal, on Nov. 3, 2001. See Thoman v. BLM, 125 IBLA 100, 102-103 (1993).

[1] In Robert E. Oriskovich, 128 IBLA 69 (1993), this Board noted that, while the failure to timely file a petition for stay results in the decision being appealed becoming effective on the day following the expiration of the appeal period, nothing in the regulations precluded the filing of a subsequent petition for stay which the Board could, in its discretion, entertain as part of its general jurisdiction over the appeal. See also Western Shoshone National Council, 130 IBLA 69, 72 (1994). The difficulty in applying this principle in the instant case arises from the fact that, with respect to grazing stays, the only jurisdiction which the Board possesses is to consider the grant or denial of a stay, and that jurisdiction only arises if a petition for stay is timely filed.

Thus, unlike the situation which normally obtains where the filing of a petition for stay is merely ancillary to the assertion of subject matter jurisdiction by the Board, insofar as appeals being taken from grazing decisions issued by the authorized officials of BLM are concerned, the timely filing of a petition for stay is the sine qua non for assertion of the Board's jurisdiction. Where, as here, the petition for stay is untimely filed, the Board lacks authority to consider its grant or denial.

In view of the foregoing, the Board has no choice but to dismiss the instant petition.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is dismissed.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge